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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 202

PAN AMERICAN AIRWAYS, INC., AND NATIONAL SURETY CORPORATION, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The majority (R. 37–40) and dissenting (R. 40–44) opinions in the circuit court of appeals are reported in 135 F. (2d) 51. The opinion of the district court (R. 21–26) is reported in 39 F. Supp. 297.

JURISDICTION

The judgment of the circuit court of appeals was entered April 29, 1943 (R. 45). The petition for a writ of certiorari was filed July 27, 1943. The

jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Does Section 9 of the Immigration Act of 1903, as amended, apply to civil aircraft of its own force or solely by virtue of adoption by the Secretary of Labor[1] in regulations issued under Section 7 (d) of the Air Commerce Act of 1926?

2. If the latter, is the applicable civil penalty the one provided by Section 9, or the one provided by Section 11 (b) of the Air Commerce Act of 1926?

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations are set forth in the Appendix, *infra,* pp. 21–25.

STATEMENT

There is no dispute as to the facts. Petitioners by their demurrers (R. 7–13), pleas (R. 14–18), and stipulation for judgment (R. 27–29), conceded that on February 3, 1935, petitioner Pan American Airways, as found by the Secretary of Labor, transported from Nassau in the Bahamas to Miami, Florida, an alien afflicted with tubercu-

[1] The Attorney General was substituted for the Secretary of Labor by virtue of Reorganization Plan No. 5, effective June 14, 1940 (5 Fed. Reg. 2223; 54 Stat. 1238 (5 U. S. C. 133v)). Since this occurred after the pertinent facts arose in the present case, the textual discussion refers to the Secretary of Labor rather than to the Attorney General.

losis. The Secretary assessed a $1,000 fine and the present suit for collection was brought against petitioners as principal and surety on their bond (R. 3–6) given to secure clearance of Pan American's aircraft pending determination and payment of any alleged liability for violations of the immigration laws.

In striking three of petitioners' pleas to the declaration, the district court held that Section 9 of the Immigration Act of 1903, as amended, is applicable to air commerce only by virtue of its adoption by regulations (Appendix, *infra,* pp. 24–25) issued by the Secretary of Labor pursuant to Section 7 (d) of the Air Commerce Act of 1926, but that having been so adopted the penalty of $1,000 provided by Section 9 applies. The court said that the $500 penalty provided by Section 11 (b) of the Air Commerce Act is applicable only where the regulation violated is itself of administrative origin or carries no penalty of its own. (R. 21–26.)[2] In consequence of this determination, the parties stipulated that a final judgment be entered requiring petitioner Pan American Airways to pay $1,000 as a fine for violation of Section 9 of the Immigration Act of 1903, as amended (R. 27–29). The court accordingly entered such a judgment (R. 29–30).

[2] The court said: "But as to any law of Congress carrying a penalty, made applicable to air commerce by executive order, the penalty provided by Congress in the first instance does apply" (R. 24–25).

On appeal, the court below, with Judge Hutcheson dissenting, affirmed the judgment (R. 45). The decision of the majority was based upon the ground, however, that Section 9 of the Immigration Act was applicable of its own force; that the statute "was designed to protect the health and general welfare of the nation against the hazards incident to the importation of aliens afflicted with any loathsome or contagious disease * * * regardless of the means by which the importation might be accomplished"; and that its language, construed by the court to cover "any person or transportation company," other than railway lines entering the United States from foreign contiguous territories, was intentionally broad enough to include petitioner Pan American Airways (R. 39).

Judge Hutcheson was of the view that for Section 9 to apply of its own force, wholly apart from the suspensive effect of the Air Commerce Act, the carrier must either have entered the United States from foreign contiguous territory or else be a "vessel"; that an aircraft is not a "vessel" and therefore Section 9 standing alone "would furnish no basis whatever for its application to an aircraft bringing a diseased alien from a non-contiguous foreign country," as did petitioner Pan American Airways; that, in any event, the Air Commerce Act of 1926 suspended the application of Section 9 of the Immigration Act to aircraft except as it should specifically be

made applicable by regulations issued by the Secretary of Labor; and that therefore petitioner Pan American Airways' act was a violation only of the Secretary's regulations, to which the $500 penalty provided by Section 11 (b) of the Air Commerce Act was the only penalty properly applicable. (R. 41–44.)

ARGUMENT

1. Contrary to petitioner's position which adopts the dissenting views of Judge Hutcheson (Pet. 2), we believe that there are cogent reasons supporting the opinion of the majority of the circuit court of appeals. The majority opinion, as we are advised by the Chairman of the Board of Immigration Appeals, is in accord with the Board's consistent and long-standing administrative interpretation of Section 9 of the Immigration Act that regards "railway lines entering the United States from foreign contiguous territory" [sec. 9] as the only exception from its coverage. We may concede, as petitioners urge (Pet. 16), that this construction renders the words "entering the United States from foreign contiguous territory" redundant, since railway lines cannot enter the United States except from foreign contiguous territory.[3] It is our belief, however, that these

[3] To be noncontiguous, the territory must be separated by the high seas. *United States* v. *Hunter*, 80 F. (2d) 968, 969–970 (C. C. A. 5). The use of the words "by water" in Section 16 (a) of the Immigration Act of 1924 (8 U. S. C. 216), as applied to transportation of aliens from noncontiguous terri-

descriptive words merely suggest the reason for making an exception from the statute where the carrier entering the United States from foreign contiguous territory is a railway line.

Since railway lines operate on regular schedules between fixed termini, through border ports of entry, an ineligible alien passenger may be turned back at the border, with complete freedom of movement in the contiguous country and a certain and quickly available means of return transportation. Facilities for pre-entrance examination are in fact available.[4] So far as a railway carrier is concerned, there is no basis for compelling it, as distinguished from requesting it,[5] to differentiate, for example, in Mexico, between a passenger who travels from Mexico City to Juarez with the intention of continuing into the United States, and one who makes the same trip intending to remain in Mexico. In many instances, the railway no doubt could not validly refuse to carry the passenger as far as Juarez. Objectively, the journey in Mexico may be completely dissociated from entrance into the United States. There need be no occasion for interning the alien even temporarily within the

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tory, represented a similar redundancy as of the date of the statute's enactment, since the purpose was patently not to differentiate water from air transportation but rather from land transportation. Yet there could have been no need of the words "by water" to create such differentiation, since transportation from noncontiguous territory was never by land.

[4] See 8 U. S. C. 160; 8 C. F. R. 4.2–4.4.

[5] See 8 U. S. C. 217.

United States, as there inevitably is in the case of one whose physical entrance into the United States by vessel, airplane, or in some instances motor vehicle, has become an accomplished fact before an opportunity for the official denial of admission could occur. It is therefore unnecessary to subject a railway carrier to fines that help defray the cost of temporary internment within the United States.[6] Moreover, there is no reason to make the railway carrier responsible financially for the alien's return transportation, since, owing to the circumstances of his exclusion, an impecunious condition on his part poses no problem for this country.

We agree with petitioners' suggestion (Pet. 17) that the words "including any transportation company other than railway lines entering the United States from foreign contiguous territory, or the owner, master, agent, or consignee of any vessel" [sec. 9], must be deemed to refer back to the phrase "any person." But petitioners' further contention that it follows that "the only sensible construction of Section 9" is that the words "entering the United States from foreign contiguous territory" qualify the words "any person," is, we submit, both erroneous and inconsist-

[6] Like any other carrier, a railway line is in fact subject to a fine of $2,000 for actually bringing an alien into the United States from Canada or Mexico without having provided an approved landing station at the point of entry. 8 U. S. C. 160, 144.

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ent with its premise. For if the words beginning with "including" and ending with "vessel" refer back to "any person," it must follow that the words "or the owner, master, agent, or consignee of any vessel" are in the disjunctive either with "any transportation company" or with "railway lines,"[7] but not with "any person." That they are not in the disjunctive with "any person" is made still clearer by the failure of Congress to repeat immediately preceding them the word "for," which immediately precedes the words "any person." Yet if they are not in the disjunctive with "any person" but instead are partially definitive thereof, and if at the same time petitioners are correct in their contention that "any person" are the words to which the further words "entering the United States from foreign contiguous territory" refer, it must follow that the latter words are equally restrictive with respect to "the owner, master, agent, or consignee of any vessel" and that therefore the entire statute has application only to a carrier entering the United States from foreign contiguous territory. Such a construction would render virtually nugatory the reference to a "vessel," which normally would

[7] They clearly are not in the disjunctive with "railway lines," which are excepted, for such a construction, prior to the advent of air and motor vehicle transportation, would have deprived the statute of all effect, and the statute is clearly applicable to transportation by vessel from noncontiguous territory. *Lloyd Sabaudo Societa Anonima per Azioni* v. *Elting*, 287 U. S. 329.

come from non-contiguous territory, and also the further reference to "any insular possession of the United States," which can never be "foreign contiguous territory"; such an absurd result would thereby be achieved that petitioners' argument must fail.[8]

The phrase "entering the United States from foreign contiguous territory" must, then, modify either "transportation company" or "railway lines." To construe it as modifying "transportation company," as do petitioners (Pet. 16–17), does violence to the word-order and punctuation; to the consistent and long-standing administrative interpretation; and, it is submitted, to the reason for the exception from the statute of railway lines (see pp. 6–7, *supra*). Such a construction as applied to air transportation, unless an airplane is held to be a "vessel," would produce the incongruous result of the statute's being applicable to air transportation of an ineligible alien from Canada or Mexico though not to such transportation from any other foreign country or insular possession of the United States. The application of the statute would thus be contracted in inverse proportion to its need. While petitioners are correct in pointing out (Pet. 18) that it is not uncommon for the customs and immigration laws to deal separately with contiguous and noncontiguous territory,[9] it would be anomalous to con-

[8] See footnote 7, *supra*, p. 8.

[9] See 8 U. S. C. 160, 216, 217.

clude therefrom that the present statute exempts altogether a form of transportation proceeding from noncontiguous territory while including it when proceeding from contiguous territory. To have any semblance of reason or consistency with the general statutory pattern, the distinction between contiguous and noncontiguous territory would have to operate in the present connection in a manner exactly the reverse of that for which petitioners contend (see Pet. 19). The fact that at the time the statute was enacted Congress doubtless had in mind only land and water transportation should not be allowed to produce incongruous results as to subsequently developing forms of transportation if such results, by a reasonable interpretation of the statutory language, may be avoided. We therefore submit that the circuit court of appeals was correct in holding that the sole exception made by the terms of the statute is "of aliens imported by rail from foreign contiguous territories" (R. 39).

The application of the statute to air transportation thus does not depend upon an airplane's being held to be a "vessel" [10] within the meaning of the second disjunctive phrase definitive of the word "person" [sec. 9]. As petitioners admit

[10] A "hydro-aeroplane," moored in navigable waters, has been held subject to admiralty jurisdiction to the exclusion of a state Workmen's Compensation Law. *Matter of Reinhardt* v. *Newport F. S. Corp.*, 232 N. Y. 115 (1921).

(Pet. 16), Pan American Airways is obviously both a "person" and a "transportation company." Since the prohibition is of an act inimical to the welfare of the country, to which the particular mode of transportation is immaterial, aside from the single exception of railway lines not here pertinent, it is submitted that air transportation is not excepted by virtue of its having been nonexistent at the time the statute was first enacted.[11]

Therefore, apart from the possible effect of the provisions of the Air Commerce Act of 1926, the court below correctly held that Section 9 of the Immigration Act is applicable of its own force to air transportation, including such transportation from noncontiguous foreign territory as in the present case.

2. Congress entitled Section 7 of the Air Commerce Act of 1926 (44 Stat. 572) "Application [rather than "Suspension"] of existing laws relating to foreign commerce." Its four subsections deal separately with different kinds of laws relat-

[11] Air transportation of a woman for an immoral purpose clearly falls within the Mann Act of 1910 (18 U. S. C. 398). *Reginelli* v. *United States*, 133 F. (2d) 595 (C. C. A. 3), certiorari denied, 318 U. S. 783. *McBoyle* v. *United States*, 283 U. S. 25 (Pet. 15, 19), is inapposite; it holds merely that the theft of an airplane is not covered by a federal statute that relates not to theft of personal property generally but only to theft of motor vehicles. Here the statute relates generally to transportation of diseased aliens, whatever the means, apart from the single railway exception here immaterial.

ing to foreign commerce. Subsection (a) is the only one purporting to provide that any existing laws "shall not be construed" to apply to aircraft, and it refers only to "navigation and shipping laws," which, both in their natural meaning and from their context, cannot be deemed to include "customs and public health laws," dealt with in subsection (b), or "laws relating to immigration," dealt with in subsection (d).[12] It is significant in this connection that subsections (a), (b), (c), and (d) are wholly separate subsections rather than subdivisions of subsection (a).

Subsection (d) authorized the Secretary of Labor "by regulation to provide for the application to civil-air navigation of the laws and regulations relating to the administration of the immigration laws to such extent and upon such con-

[12] There was good reason for such a special provision with respect to "navigation and shipping laws," which for the most part represent an exercise of admiralty jurisdiction, the application of which to aircraft depended in the first place upon whether the particular craft was a seaplane or a land plane, and in the second place, if a seaplane, upon whether it was in flight, or moored or floating upon navigable water. *Matter of Reinhardt* v. *Newport F. S. Corp.*, 232 N. Y. 115, 117–119 (1921). Yet the requirements of air commerce obviously could not depend upon such distinctions, and therefore, by an exercise of the commerce power, Congress sought in subsection (c) to make possible a practicable and uniform adaptation to all aircraft of the "navigation and shipping laws" already in existence which relate to the entry and clearance of vessels.

ditions as he deems necessary."[13] The scope of the delegation of legislative power to the Secretary of Labor should be construed in such a way as to avoid doubts of its constitutional propriety. Cf. *Minnesota ex rel. Pearson* v. *Probate Court*, 309 U. S. 270, 274; *Driscoll* v. *Edison Light and Power Co.*, 307 U. S. 104, 115; *Interstate Commerce Commission* v. *Oregon-Washington Railroad & Navigation Co.*, 288 U. S. 14, 40; *United States* v. *Shreveport Grain & Elevator Co.*, 287 U. S. 77, 82; *United States* v. *La Franca*, 282 U. S. 568, 574. If its scope is confined to the adaptation to air commerce of existing laws and regulations that, but for being couched in terms exclusively applicable to land or water carriers, would with good reason apply to air commerce, the delegation is of a kind readily sustainable. Cf. *J. W. Hampton, Jr., & Company* v. *United States*, 276 U. S. 394; *Field* v. *Clark*, 143 U. S. 649. So confined, an adequate standard for both administrative and judicial application is inherent in the subject matter. *United States* v. *Grimaud*, 220 U. S. 506.

An interpretation so restricting the scope of the delegation is consistent with the words "to

[13] Congress evidently intended to distinguish between "immigration laws" and "laws and regulations relating to the administration of the immigration laws." Section 9 of the Immigration Act is probably a law of the latter kind, since its purpose is to implement and enforce the exclusion of aliens rendered ineligible to admission by another Section (8 U. S. C. 136), which itself is more strictly an "immigration law."

such extent and upon such conditions as he deems necessary." These words imply not unlimited discretion but the exercise of a reasonable judgment as to the necessity. The basis for such a judgment clearly exists where the reasons for a law in terms applicable only to land or water carriers would apply to air carriers. To make possible the needed flexibility and variation to meet the requirements of air commerce, Congress did not require the adoption *in toto* of such laws, or under all conditions. But where, however, an existing law is in reason and by its own terms as clearly applicable to air commerce as is Section 9 of the Immigration Act, there would seem to be no place left for the exercise of a judgment by the Secretary of Labor as to the necessity for such application, short of a complete relinquishment by Congress to the Secretary, until reclaimed, of its legislative power in the premises. The Air Commerce Act cannot be interpreted as suspending all such existing laws in their application to air commerce subject to revival in whole or in part by the Secretary and upon conditions designated by him, without raising serious constitutional doubts based on the absence of a sufficient standard to justify such a questionably broad delegation.[14]

[14] The situation is not comparable to that which in *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, was held in effect to justify the delegation to the President of an unfettered discretion in a matter of foreign relations.

We submit, therefore, that the extent of the Secretary's delegated power under the Air Commerce Act was the adaptation to air commerce of existing laws and regulations that were inapplicable of their own force but which, apart from their being phrased in words exclusively applicable to land or water carriers, would with good reason apply in whole or in part or under all or some conditions to it; and that the Air Commerce Act did not suspend, subject to revival at the discretion of the Secretary, any law relating to the administration of the immigration laws that was already applicable of its own force to air carriers and carried its own penalty. This construction is reinforced by the legislative history of the Air Commerce Act which, while providing no clear answer to the points at issue, shows a purpose "to prevent the use of aircraft as instruments for evading our customs, public health, narcotic drug, and neutrality [and presumably immigration] laws." [15] Such a purpose is promoted by the con-

[15] H. Rep. No. 1262, 68th Cong., 2d Sess., p. 3. Compare, however, the following statement by Frederic P. Lee, Legislative Counsel, United States Senate, in *The Air Commerce Act of 1926*, 12 A. B. A. J. 371, 374 (1926): "Finally, the laws relating to the entry and clearance of vessels, the customs laws, the immigration laws, and the public health laws are to be made applicable to air commerce by regulations of the respective Secretaries administering such laws. At present the entry and clearance laws and the customs laws by reason of definitions of vessel and vehicle which are broad enough to include aircraft, apply to air

struction for which we contend, but not by one which would suspend laws already applicable to aircraft.

Further support for the more restrictive construction derives from a consideration of the penalty provision of Section 11 (b) of the Air Commerce Act, which subjects any person violating "any immigration regulation made under" Section 7 (d) "to a civil penalty of $500 which may be remitted or mitigated by the * * * Secretary of Labor * * * in accordance with such proceedings as the Secretary shall by regulation prescribe." It is significant, as the district court pointed out (R. 24–25), that the statutory language refers expressly to "any immigration *regulation made* under" [italics supplied], rather than to any law adopted pursuant to, Section 7 (d). And it is difficult to impute to Congress an intention, nowhere expressed by it, to create such a great disparity between air and other carriers with respect to the civil consequences of the same act. The construction for which petitioners contend not only would cut the $1,000 penalty of Section 9 of the Immigration Act in half in the case of air carriers, but would also allow remission or mitigation to them exclusively and would relieve

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commerce. Being framed, however, without a knowledge of or with special regard to the needs of air commerce, such laws are so unreasonably restrictive in their application to air commerce that carriers by air would find it impossible in practice to comply with the provisions of such laws."

them entirely of the financial responsibility for the alien's return that is imposed on other carriers by the same Section. It would be difficult to establish reasons justifying such discrimination even if the legislation expressly provided for this effect. Nor would such a construction represent the type of adaptation to the special requirements of air commerce that otherwise actuated Congress in enacting the 1926 statute. An intent to provide such an unwarranted discrimination should accordingly not be imputed.

3. It is submitted that the foregoing analysis sustains the decision of the circuit court of appeals that Section 9 of the Immigration Act has remained in effect of its own force. In the alternative, however, if, as petitioners contend (Pet. 13–15), the effect of the Air Commerce Act of 1926 was to suspend the application of Section 9 to air commerce, subject to later revival by adoptive regulations issued by the Secretary of Labor, the same reasoning (pp. 16–17, *supra*), based on the language of Section 11 (b) of the later statute and the unwarranted discrimination as to civil consequences that would otherwise result in favor of air carriers, sustains the decision of the district court that, when adopted, Section 9 continued to carry its own penalty. Only in the event of a determination that Section 9 was never at any time applicable of its own force to air carriers, but was made applicable for the first time by the regulations issued by the Secretary of Labor, could a

plausible case be made for the substitution of the $500 for the $1,000 penalty. Such a view, however, is of doubtful consistency with Rules 5A2 and 5G1 of the Immigration Laws and Rules of January 1, 1930, as originally promulgated (*infra,* pp. 24–25), and is clearly inconsistent with a subsequent amendment to those rules providing expressly that where the act of an air carrier "would be a violation of the immigration laws and general regulations *if the aircraft were a vessel* (*operating on water*), the penalty shall be the same *as would apply* in the case of a vessel" [italics supplied]. (8 C. F. R., 1941 Supp., 116.60 (a).) The administrative position is that a statutory provision given application to air commerce by an adoptive regulation issued pursuant to Section 7 (d) of the Air Commerce Act, continues to carry its own penalty, even though it had no previous application of its own force to such commerce. This avoids the making of an unwarranted discrimination between air and other carriers with respect to the civil consequences of the same act. No greater degree of delegation is involved in the administrative adoption of a statute carrying with it its own penalty than in the administrative adoption of a statute to which is made applicable the $500 penalty of the Air Commerce Act. In either event, Congress itself has provided the penalty in advance, and created the liability, within the meaning of constitutional requirements (*United States* v. *Grimaud,* 220 U. S. 506).

While, as petitioners point out (Pet. 21), the Secretaries of the Treasury and of Commerce have provided only for the $500 penalty of the Air Commerce Act,[16] they have not purported to make applicable to air carriers, by the method of incorporation by reference, any of the laws relating to customs or to the entry and clearance of vessels. Instead, they have promulgated regulations which, although based upon such laws, are complete in themselves; and the penalty provided is for a violation of any of these regulations. There was therefore no occasion for these Secretaries to recognize as applicable a different penalty where provided by a statute adopted by reference, since no statute was so adopted; and their failure to do so is without the significance that petitioners attach to it. Under the circumstances, their provision for the $500 penalty alone is fully consistent with the view of the district court in the present case that such penalty of the Air Commerce Act is the one applicable wherever the violation is of an administrative regulation as distinguished from a statute, adopted by reference, that carries its own penalty (R. 24–25).[17]

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[16] 14 C. F. R. 94.17, 94.20; 19 C. F. R., 1941 Supp., 4.10b, 4.10c, 4.10e.

[17] Petitioners' contention (Pet. 19) that "this is not a suit to collect a penalty as such, but an action to enforce a bond," and that Section 9 of the Immigration Act does not of its own force operate to require a bond of the owner of an aircraft, is without merit. Petitioners are estopped to assert such a defense to liability on the bond. *Carroll* v. *National Surety Co.*, 24 F. (2d) 268, 270 (App. D. C.). Furthermore,

CONCLUSION

While the questions of statutory construction are novel and difficult, the courts below, we think, reached the correct result, and there is involved no conflict of decisions. Moreover, since the problem concerns the bringing in by aircraft of diseased aliens from foreign noncontiguous territory, it would seem, in view of the abnormal conditions now prevailing, that it is one which is not likely to recur with any frequency, at least for the present. Indeed, the circumstance that this is the first case involving the problem which has arisen since the inauguration of foreign air commerce would seem to indicate that, even under normal conditions, the question is not one of especial importance. Review on certiorari, therefore, may well be postponed, we believe, until such time as conflict with another circuit may arise. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
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SEPTEMBER 1943.

Section 7 (d) of the Air Commerce Act of 1926 clearly authorized the Secretary of Labor to make applicable to air carriers, to secure their obligation under Section 9 of the Immigration Act, the requirement of a bond already applicable under Section 9 to owners of vessels. The enforceability of the bond thus in no way depends upon whether the source of the liability secured is derived from Section 9 of the Immigration Act or Section 11 (b) of the Air Commerce Act.